

FILED

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CENTRAL DIST. OF CALIF.
LOS ANGELES

BY _____

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Eugene Baker,

PLAINTIFF(S),

v.

Eric Holder, et al.,

DEFENDANT(S).

CASE NUMBER:

CV 10-3996-SVW (AJW)

NOTICE OF APPEAL

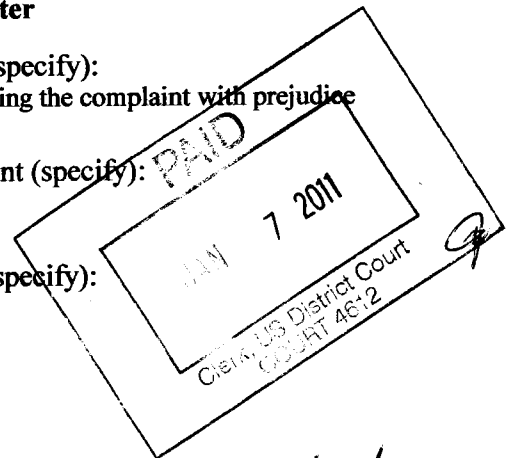
NOTICE IS HEREBY GIVEN that Eugene Baker hereby appeals to
Name of Appellant
 the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

- ☐ Conviction only [F.R.Cr.P. 32(j)(1)(A)]
☐ Conviction and Sentence
☐ Sentence Only (18 U.S.C. 3742)
☐ Pursuant to F.R.Cr.P. 32(j)(2)
☐ Interlocutory Appeals
☐ Sentence imposed:

☐ Bail status:**Civil Matter**

- ☒ Order (specify):
 dismissing the complaint with prejudice
☐ Judgment (specify):
☐ Other (specify):



Imposed or Filed on 10/26/10. Entered on the docket in this action on 10/27/10.

A copy of said judgment or order is attached hereto.

December 22, 2010

Date

Signature

☒ Appellant/ProSe ☐ Counsel for Appellant ☐ Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

Court Name: U.S. District Court
Division: 2
Receipt Number: LA007143
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Transaction Date: 01/07/2011
Payer Name: BURNCOT LIGHT TECHNOLOGIES

NOTICE OF APPEAL/DOCKETING FEE
For: BURNCOT LIGHT TECHNOLOGIES
Case/Party: D-CAC-2-10-CV-003996-001
Amount: \$455.00

CHECK
Check/Money Order Num: 2945
Amt Tendered: \$455.00

Total Due: \$455.00
Total Tendered: \$455.00
Change Amt: \$0.00

No refunds without original
receipt. Returned checks will be
assessed a fee of \$45.00.

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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9

10 EUGENE EVAN BAKER,) NO. CV 10-3996-SVW (AJWx)
11)
12 Plaintiff,)
13)
14 v.) ORDER GRANTING DEFENDANT'S
15) MOTION TO DISMISS COMPLAINT
16 ERIC H. HOLDER, JR.,) WITH PREJUDICE [6]
17 ATTORNEY GENERAL)
18) JS6
19 Defendants.)
20 _____)
21)
22)
23)
24)
25)
26)
27)
28)

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20 **I. BACKGROUND**

21 On May 27, 2010, Eugene Evan Baker ("Plaintiff") filed a Complaint
22 seeking declaratory and injunctive relief from the Attorney General so
23 he could purchase a firearm. Plaintiff was convicted of a misdemeanor
24 crime of domestic violence ("MCDV") in California in 1997. Compl. ¶ 1.
25 Under 18 U.S.C. § 922(g)(9) ("The Gun Control Act"), Congress has made
26 it "unlawful for any person who has been convicted in any court of a
27 misdemeanor crime of domestic violence . . . to possess . . . any
28 firearm." Title 18, U.S.C. § 921(33)(B)(ii) carves out an exception to
this general rule, stating, "A person shall not be considered to have

1 been convicted of such an offense for purposes of this chapter if the
2 conviction has been expunged or set aside . . . unless the pardon,
3 expungement, or restoration of civil rights expressly provides that the
4 person may not . . . possess . . . firearms."

5 In 2002, that conviction was set aside, or "expunged" under Cal.
6 Penal Code § 1203.4.¹ Compl. ¶ 1. The expungement order was silent as
7 to Plaintiff's rights to possess firearms. Based solely on these facts
8 alone in his Complaint, Plaintiff asks this Court to "Issue a judicial
9 Declaration that since October 20th, 2007, [Plaintiff] has been
10 entitled to exercise his rights under the Second Amendment to the
11 Constitution of the United States and that he is entitled under federal
12 law to purchase . . . firearms . . . without risk and threat of
13 prosecution. . . ." Compl. ¶ 2.

14 The Attorney General ("Defendant") then filed a Motion to Dismiss
15 Under FRCP 12(b)(1), arguing Plaintiff had suffered no injury in fact
16 and the case was not ripe. In addition, under FRCP 12(b)(6), Defendant
17 argued that Jennings v. Mukasey, 511 F.3d 894 (9th Cir. 2007), squarely
18 disposed of Plaintiff's Complaint.

19 In response, Plaintiff improperly supplemented the facts in his
20 Complaint in his Opposition to Defendant's Motion. Plaintiff added
21 that on June 8th, 2009, Plaintiff went to a gun show and attempted to
22

23 ¹The Court notes that Plaintiff's briefs and complaint assert the
24 position that the set aside was completed under California Penal Code
25 Section 1203.4 subdivision (a), not Section 1203.4a. In relevant
part, California Penal Code Section 1203.4(a) states:

26 "In any case in which a defendant has fulfilled the conditions
of probation . . . the court shall set aside the verdict of guilty .
27 . . and dismiss the accusations . . . against the defendant and . . .
he or she shall thereafter be released from formal penalties and
disabilities resulting from the offense of which he or she has been
28 convicted. . . ."

1 purchase a firearm. Upon tendering the payment and applying for the
2 weapon, Plaintiff was rejected because of his prior MCDV. After
3 Plaintiff's counsel requested a response from the California Department
4 of Justice, Plaintiff discovered that he was on a list of people
5 prohibited from purchasing firearms under the Gun Control Act and state
6 laws. Plaintiff then went to Superior Court, requested, and received,
7 a declaration stating he was free to purchase firearms under the laws
8 of the State of California under the terms of his expungement.
9 However, he is currently still barred from purchasing a firearm under
10 the Federal Gun Control Act.

11 **II. MOTION TO DISMISS**

12 **A. Legal Standard**

13 A challenge to the Court's jurisdiction is brought under Federal
14 Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion may be based
15 on a facial challenge to the sufficiency of the jurisdictional
16 allegations in the complaint. "[W]hen this type of attack is mounted,
17 the court must accept as true all well-pleaded facts and draw all
18 reasonable inferences in favor of the plaintiff." Nasoordeen v. FDIC,
19 No. CV 08-05631 MMM (AJWx), 2010 WL 1135888 at *5 (C.D. Cal., Mar. 17,
20 2010) (citing Ass'n of Am. Med. Colleges v. United States, 217 F.3d
21 770, 778-79 (9th Cir. 2000)).

22 On a 12(b)(6) Motion to Dismiss, a plaintiff's complaint "must
23 contain sufficient factual matter, accepted as true, to 'state a claim
24 to relief that is plausible on its face.'" Ashcroft v. Iqbal, __ U.S.
25 __, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v.
26 Twombly, 550 U.S. 544 (2007)). "A claim has facial plausibility when
27 the plaintiff pleads factual content that allows the court to draw the
28

1 reasonable inference that the defendant is liable for the misconduct
2 alleged." Id. A complaint that offers mere "labels and conclusions"
3 or "a formulaic recitation of the elements of a cause of action will
4 not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969
5 (9th Cir. 2009) (citing Iqbal, 129 S.Ct. at 1951).

6 When a court grants a motion to dismiss, ordinarily "any
7 dismissal[,] . . . except one for lack of jurisdiction, improper venue,
8 or failure to join a party under Rule 19[,] operates as an adjudication
9 on the merits." Fed. R. Civ. P. 41(b). However, the court may specify
10 that the dismissal is without prejudice to refiling the claim in a
11 separate action. See, e.g., Swaida v. Gentiva Health Services, 238 F.
12 Supp. 2d 325, 328 (D. Mass. 2002) ("dismissal [is] presumed to be with
13 prejudice unless the order explicitly states otherwise"); Seaweed, Inc.
14 v. DMA Product & Design & Marketing LLC, 219 F. Supp. 2d 551, 554
15 (S.D.N.Y. 2002) (when dismissal "does not operate on the merits" it
16 "should not issue with prejudice"). In addition, the court may grant
17 the plaintiff leave to amend a deficient claim "when justice so
18 requires." Fed. R. Civ. P. 15(a)(2).

19 **B. Standing and Ripeness as a Basis to Dismiss Under FRCP**
20 **12(b)(1)**

21 The Court finds that the Complaint, as currently pled, is
22 insufficient in presenting a live controversy under Article III, §2.
23 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To
24 establish a "case or controversy," Plaintiff must show an "injury in
25 fact" that is concrete and not conjectural. Lujan, 504 U.S. at 560-61.
26 Similarly, "A claim is not ripe for adjudication if it rests upon
27 contingent future events that may not occur as anticipated." Texas v.
28 United States, 523 U.S. 296, 300 (internal quotation marks omitted).

1 Here, Plaintiff's Complaint only states that he was convicted of a
2 prior misdemeanor crime of domestic violence and that this crime had
3 been "expunged" by the State of California. As discussed above,
4 Plaintiff's Complaint does not allege that he ever attempted to
5 purchase a firearm or that he was ever denied. These facts are instead
6 improperly included in Plaintiff's arguments in the Opposition to
7 Defendant's Motion to Dismiss. As discussed in Part II.A., a complaint
8 must plead sufficient facts to establish the Court's jurisdiction to
9 survive a 12(b)(1) motion to dismiss. Here, Plaintiff's complaint does
10 not establish Article III jurisdiction because he fails to allege that
11 he faces any concrete injury in fact or that Defendant may ever attempt
12 to hinder his rights to own a firearm.

13 Plaintiff has not sought to amend his Complaint. Thus, the
14 Complaint should be dismissed without prejudice for this reason alone.

15 **C. *Jennings* as a Basis to Dismiss With Prejudice Under FRCP**
16 **12(b)(6)**

17 Defendant also argues that regardless of whether Plaintiff's
18 additional facts in his Opposition are included in the Complaint, under
19 the Ninth Circuit's recent interpretation of this very issue,
20 Plaintiff's complaint cannot state a claim upon which relief can be
21 granted under FRCP 12(b)(6).

22 In Jennings, a petitioner sought a review of the Bureau of
23 Alcohol, Tobacco, and Firearms' ("ATF") denial of his application for a
24 renewal of a firearms license. Jennings, 511 F.3d at 896. The
25 petitioner had previously been convicted in California of a MCDV and
26 had his conviction expunged by a 1999 expungement order, similar to the
27 Plaintiff's expungement order in this case. Id. The petitioner argued
28 that under 18 U.S.C. § 921(33)(B)(ii) and because of his expungement

CERTIFICATE OF SERVICE

I, the undersigned, declare:

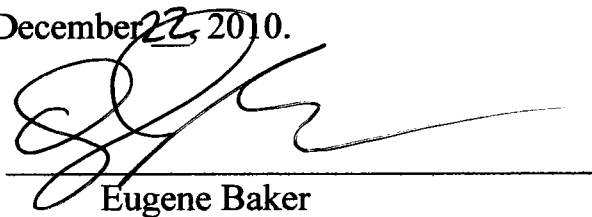
On December 22 2010, I served a copy of the attached

Notice of Appeal

upon the interested parties herein, by causing a true and correct copy of said documents to be enclosed in a sealed envelope and deposited in the United States mail or by third party commercial carrier for delivery within three calendar days, at SOMIS, California, addressed as follows:

Ira Daves, Esq.
Asst. United States Attorney
312 N. Spring St.
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 22 2010.



Eugene Baker

